SENATE RECORD VOTE ANALYSIS

104th Congress — December 20, 1995, 7:15 p.m.
1st Session — **Vote No. 609** — Page S-18985 Temp. Record

WHITEWATER SUBPOENA/Substitute

SUBJECT: **Whitewater Subpoena Resolution . . . S. Res. 199. Sarbanes substitute amendment No. 3104.**

ACTION: AMENDMENT REJECTED, 45-51

SYNOPSIS: As reported by the Special Committee to Investigate Whitewater Development Corporation and Related Matters, S. Res. 199, the Whitewater Subpoena Resolution, will authorize the Senate Legal Counsel to bring a civil action to enforce the Special Committee's subpoenas to William H. Kennedy, III.

The Sarbanes substitute amendment to the resolution would strike the authority to seek civil enforcement of the subpoenas, and would instead direct the Special Committee: "(to) exhaust all available avenues of negotiation, cooperation, or other joint activity in order to obtain the notes of former White House Associate Counsel William H. Kennedy, III (formerly of the Rose law firm), taken at the meeting of November 5, 1993. The Special Committee shall make every possible effort to work cooperatively with the White House and other parties to secure the commitment of the Independent Counsel and the House of Representatives not to argue in any forum that the production of the Kennedy notes to the Special Committee constitutes a waiver of attorney-client privilege.". The substitute amendment would also strike the resolution's preamble, and would insert provisions which would note: that the White House has offered to provide the notes provided that there is not a waiver of the attorney-client privilege; that the White House's assertion that the notes are protected by that privilege is well founded; that the attorney-client privilege is a fundamental tenet of our legal system; that whenever the Congress and the President allow a court to settle a dispute between them they give enormous power to the court to write rules governing the relations between the branches of government; that an adverse precedent could make future congressional oversight and investigatory functions more difficult; that when a dispute arises, the Congress and President should recognize and try to meet each other's legitimate needs; that the White House has made such an effort; and that the Special Committee will obtain the notes more promptly through a negotiated solution than through a court order.

Those favoring the amendment contended:

(See other side)

YEAS (45)

Republicans (0 or 0%)	Democrats (45 or 100%)	
	Akaka	Hollings
	Baucus	Johnston
	Biden	Kennedy
	Bingaman	Kerrey
	Boxer	Kerry
	Bradley	Kohl
	Breaux	Lautenberg
	Bryan	Leahy
	Bumpers	Levin
	Byrd	Lieberman
	Conrad	Mikulski
	Daschle	Moseley-Braun
	Dodd	Moynihan
	Dorgan	Murray
	Exon	Nunn
	Feingold	Pell
	Feinstein	Pryor
	Ford	Reid
	Glenn	Robb
	Graham	Rockefeller
	Harkin	Sarbanes
	Heflin	Simon
		Wellstone

NAYS (51)

Republicans (51 or 100%)		Democrats (0 or 0%)
Abraham	Helms	
Ashcroft	Hutchison	
Bennett	Inhofe	
Bond	Jeffords	
Brown	Kassebaum	
Burns	Kempthorne	
Campbell	Kyl	
Chafee	Lott	
Coats	Lugar	
Cochran	Mack	
Cohen	McCain	
Coverdell	McConnell	
Craig	Murkowski	
D'Amato	Nickles	
DeWine	Pressler	
Dole	Santorum	
Domenici	Shelby	
Faircloth	Simpson	
Frist	Smith	
Gorton	Snowe	
Grams	Specter	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thompson	
Hatfield	Thurmond	
	Warner	

NOT VOTING (3)

Republicans (2)	Democrats (1)
Gramm-[2]	Inouye-[2]
Roth-[2]	

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Republican Policy Committee—Don Nickles, Chairman

The Sarbanes substitute amendment would choose a cooperative rather than a confrontational approach. No subpoenas would be issued; instead, the Special Committee would be called upon to exhaust all available avenues of negotiation, cooperation, and other joint activities with the White House and other parties in order to secure Mr. Kennedy's notes. Additionally, it would call on the committee to make similar efforts to secure a commitment from the independent counsel and the House of Representatives not to argue that releasing the notes would constitute a waiver of the attorney-client privilege. This course of action should be preferable to all Senators.

As the situation now stands, the White House has volunteered to release the notes if the Special Committee, the independent counsel, and the House Whitewater investigative committees will agree not to claim that such release will constitute a general waiver of the President and First Lady's attorney-client privilege. The Special Committee has agreed to this condition, as has the independent counsel, but the House committees have rejected it. An agreement thus appears to be very close. If we work assiduously to resolve House concerns, we are certain that an agreement will soon be reached and Mr. Kennedy's notes will be released. If, on the other hand, we choose the path of confrontation that is taken by this resolution, then it will probably take months before the issue is resolved.

Senators who are arguing in favor of issuing a subpoena are confident that a court will rule that the notes are not protected by attorney-client privilege. We think their confidence is misplaced. We agree with the President, and with many eminent legal experts, that there is a strong attorney-client privilege protecting those notes from release. If this issue is brought to the court for it to decide, the court may well rule in favor of the President. Its decision may well be one-sided enough that it will seriously hurt Congress' investigatory powers. Senators should be leery of taking this chance. For our part, we are in no hurry to give the judicial branch a case that will allow it to tilt the balance of power between the executive and legislative branches. We think it is better for the executive and legislative branches to work out their constitutional disputes between themselves.

Whether or not one agrees that an attorney-client privilege exists for the President in this particular instance, one should certainly agree that as a matter of principle some such instances do exist. The President and First Lady, like all other United States citizens, have a right to have confidential communications with their lawyers. The President, in his public capacity, also has a recognized right to have confidential legal communications with Federal Government lawyers on affairs of state. The President, rightly or wrongly (and we think rightly) believes that Mr. Kennedy's notes are protected by attorney-client privilege. From his vantage, and ours, it is reasonable then to request that this release of privileged communications not be taken to be a general waiver of the right to have privileged communications. From the vantage of those Senators who do not believe Mr. Kennedy's notes are protected, it is also eminently reasonable to say that their release will not constitute a general waiver, because they do not believe any right will be waived by the notes' release.

We are very close to resolving this matter. It would be a great mistake to prolong it by moving through an extended court battle with constitutional implications. We therefore urge the acceptance of the Sarbanes amendment to resolve this matter amicably.

Those opposing the amendment contended:

Though we do not doubt our colleagues' sincerity, the past 4 months give us absolutely no reason to believe that continued negotiations without a subpoena will result in a quicker release by the White House of Mr. Kennedy's notes. Publicly, President Clinton has talked about how he is intent on fully cooperating, but his public statements have been totally inconsistent with his stonewalling tactics. In our estimation, the only reason there has been any movement at all by the White House toward releasing these notes is that the Whitewater Special Committee issued these subpoenas.

In the Committee's efforts over the past year to take testimony, gather documents, collect phone records, and review handwritten notes, it has found that, rather than cooperation and responsiveness, it has been met with a pattern of delay, obstruction, and obfuscation. After spending months trying to get access to various documents the old-fashioned way--by asking--it discovered that a wide variety of records were being withheld. Finally, the committee began to threaten to issue subpoenas. This action started a trickle of information. Usually the information arrived either late the evening before or the morning of the hearing. Still, information was being withheld. The Chairman then issued subpoenas, and the Administration suddenly began to find and produce documents and phone records that for some reason it could not find until it had been subpoenaed. An exception has been made by the Clinton Administration for the Kennedy notes. In an unprecedented and untenable legal maneuver, it has refused to comply with the subpoena for those notes by asserting the attorney-client privilege.

On November 5, 1993, a meeting was held in Washington by seven men--three private attorneys and four White House officials. The White House officials were White House counsel Bernard Nussbaum, associate White House counsel William Kennedy (who was formerly an employee of the Rose law firm, which is under investigation for its role in Whitewater), associate White House counsel Neil Eggleston, and White House Personnel Director Bruce Lindsey. The three private attorneys who were present were current and former lawyers for the Clintons. From what the Committee has so far been able to gather, the meeting concerned: first, criminal referrals related to Madison Guaranty which named Bill and Hillary Clinton as potential witnesses, and that inferred that further investigation may result in their being more than witnesses; and second, the criminal lending practices of Capital Management Services--a federally licensed company that allegedly diverted funds to Whitewater due to pressure from then-Governor Clinton. The

Senate Whitewater hearing in 1994 discovered that this confidential information on criminal referrals was released to the White House, which was unquestionably unethical and possibly illegal. This meeting is clearly related to concern over this release of information on a criminal investigation to the White House, and it may well have involved another offense--the transfer of this confidential information from White House officials to private attorneys representing the Clintons.

The Committee has sought this information since August 25, 1995 and has been stonewalled by the White House. On November 2, after numerous meetings with the White House on its refusal to release information, the Committee specifically offered to accept the Kennedy notes on the understanding that their release would not constitute a waiver of the attorney-client privilege. The committee did not mind making that offer because it did not believe that the White House's assertion of that privilege was even remotely legitimate (see vote No. 610 for a discussion of the attorney-client privilege). Therefore, because their release would not be a waiver of the privilege in the particular instance, their release could not reasonably be deemed to be a general waiver. The White House refused that offer.

For the next six weeks the Committee negotiated with the White House for the release of the documents. Those negotiations were fruitless, so the Committee finally issued a subpoena on December 8. It gave the White House an opportunity to respond, reviewed its response and found it inadequate, and issued a second subpoena on December 15. The White House has continued to refuse to comply, so it is now necessary to seek enforcement of the subpoena. Now that the matter has reached the Senate floor, it appears that the White House is moving toward avoiding a confrontation. It has now said that it will release the notes if both the Independent Counsel and the House also agree that doing so does not constitute a waiver of the attorney-client privilege. The Senate has no control over the independent investigative authority of either the Independent Counsel or the House, and it would be entirely inappropriate, illegal, and perhaps even unconstitutional for it to attempt to interfere in their investigations. Surely our colleagues, who have expressed so much concern in the past that any Senate investigation not interfere with the Independent Counsel's investigation, should appreciate this point.

As an aside, even if we believed that the approach advocated by this substitute amendment were meritorious, we could not accept it because it states that "the White House has made a well-founded assertion, supported by respected legal authorities, that the November 5, 1993 meeting is protected by the attorney-client privilege. " We categorically reject this statement. No privilege of any sort attached to that meeting, and we will not endorse any legislation making that claim. Further, a cooperative approach is not enough. The only time the Clinton Administration has been forthcoming is when it has been pressured. President Clinton may have repeatedly promised he would be fully cooperative, and that he would never hide behind privilege or other procedural dodges to keep Whitewater information from investigators, but investigators have found that this promise has only been good when he has been pressured to live up to it.

The Clinton Administration may have good reason not to want to release Mr. Kennedy's notes. Unlike the parade of Administration witnesses who have testified, those notes will not have selective memory lapses. Backing down on enforcing the subpoena will let the White House off the hook, and those notes will never be turned over to the Senate. Our goal is not to go through a lengthy legal fight, or to embarrass the President by exposing his stonewalling. If he turns over the notes at any time we will desist. Until we actually have those notes, however, we must keep up the pressure, because the past 4 months have shown that without pressure the Clinton Administration will not cooperate with Whitewater investigators.